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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and SALARY POLICY EMPLOYEE PANEL,

Petitioners,

v.

W. EUGENE BOWMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a labor organization, in contracting to adopt a less vigorous form of union security than an agency shop by granting inducements to employees to pay for their representation through a preference in transfer clause, rather than compulsion by discharge, breaches its duty of fair representation to non-consenting employees in the bargaining unit.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Tennessee is unreported. Its full text is contained in an appendix to this petition.

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on Sept. 24, 1984, is reported at 744 F.2d 1207.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Tennessee Valley Authority Act of 1933, 16 U.S.C. Sec. 831-831dd, as amended.

STATEMENT

A.

In industrial relations in this country, payments for the financial maintenance of a collective bargaining agent are obtained from two groups of employees, always separate and distinct. The first consists of those who are willing and voluntary payors. The second consists of those who are unwilling, involuntary payors.

There are only two known methods to obtain payment from the unwilling group. The first is by compulsion—pay or lose your job. That method of obtaining financial support for the bargaining agent has been judicially approved.

The second method eschews compulsion in favor of inducement. The recalcitrant is not compelled by threat of loss of job to do anything. He is offered an inducement—in this case, certain preferences if he would pay the equivalent amount of dues for the support of the bargaining agent. He may decline to financially support the bargaining agent and forego the benefit that would attach to such support.

The Court of Appeals, following established judicial precedent, has recognized that the compulsion

method is legally permissible. But it has held that the inducement method is illegal.

Reduction to its simplest terms leaves this conclusion: One may by contract compel the recalcitrant to pay or else discharge him. But one may not merely induce him to pay and allow him to retain his job. Compulsion is permissible—inducement is not.

The Court of Appeals has constructed this mode of illegality by holding that a labor organization that agrees to an inducement clause breaches its duty of fair representation to the recalcitrant employee.

This holding, and the foundation on which it rests, raises issues of utmost importance, fully warranting review by this Court.

B.

While this case arises in the public sector, where the Tennessee Valley Authority has for decades engaged in collective bargaining with labor unions representing its employees, its content and importance reaches throughout all of American industrial relations because the principles of law contained in it apply with equal persuasion to both the public and private sector.

TVA and the petitioning unions in this case entered into an agreement which all parties believed was a legitimate union security device. Rather than grant a union shop or agency shop to the union negotiators, TVA granted certain preferences to those employees who would voluntarily become union members (or who would make dues-equivalency payments). The preference involved in this case is to allow union members

priority over non-members in rejecting transfer assignments.

TVA has negotiated and executed successive collective bargaining agreements with its white collar unions since 1950 by dealing with a coalition of unions known as the Salary Policy Employee Panel, one of the petitioners herein. Petitioner Office and Professional Employees International Union, AFL-CIO, CLC, hereinafter referred to as OPEIU, is one of five constituent unions that make up the Salary Panel. Respondent Bowman, employed as a land appraiser with TVA, was in a bargaining unit represented by the OPEIU.

In this case, business necessity required TVA to transfer one of its land appraisers from among the group in which Bowman worked. When the pending transfer was made known, there were two non-members in the group, one being Bowman. One of the cardinal elements in this case was that all employees were urged and welcomed at all times, without any restraints, to become participants in the affairs of the unions, which makes it different from any other case involving fair representation in the negotiation of contracts.

One of the remaining two non-participants paid his dues and was welcomed into membership. Bowman refused. The other employees in the group exercised their preference not to transfer, leaving only Bowman. He was ordered to make the move. He refused TVA's directive. For his failure to obey the order of transfer, Bowman was discharged.

He brought suit in the District Court, alleging that petitioners breached their duty of fair representation

to him and that his rights under the First and Fifth Amendment were breached.

The trial record in this case is replete with strong and undisputed evidence that the preference clause was a limited form of union security, adopted in collective bargaining as a substitute for a full union shop or agency shop.

To obtain a union security contract was a primary goal of the unions over all the years of their bargaining history with TVA. A. R. Carson, the Salary Panel's pioneer negotiator, who was a signatory to the original 1950 agreement, told how the unions had unsuccessfully sought union security over the years (Jt. Ex. 30, at 6) when he said:

> "So, just out of the need for self-preservation, as always, the—and not liking free riders, the union was constantly seeking some means of strengthening its position.
>
> "And we asked for a union shop, closed shop, agency shop, or whatever, but every variation you could think of we probably presented to TVA at some time or another."

Carson, who retired in 1974, was followed by equally persistent and equally unsuccessful bargainers. On the other side of the table, Thomas Addington, the chief TVA negotiator in recent years in dealing with the Panel unions, when asked at the trial about the unions' demand for an agency shop, replied, "I've had this on the negotiating table on three different occasions which includes this year . . ." He added that the agency shop had been sought the two previous years as well.

Addington was asked why TVA would not agree to an Agency shop proposal. "We didn't feel like it was

appropriate to provide for a stronger union preference provision in our contract. We felt like the provision that we presently had was sufficient and did not want to increase that."

Thus, it is undisputed that the preference clauses of which transfer was the most prominent) were enacted to achieve union security maintenance goals in a lesser manner than would an agency shop.

Under this limited and less vigorous version of union security, dissenters like Bowman would never be required to join the union or help pay for his representation in any way. He could be a free rider as long as it pleased him and at the same time, he could continue to reap the benefits of collective bargaining. Even the transfer preference clause would not have disturbed his employment had he been willing to accede to the transfer as the price to be paid for his free ride. (One of the anomalies of this case is that Bowman, during the course of the proceedings below, constantly proclaimed that his involuntary transfer was made in derogation of his "seniority rights," all the while unwilling to recognize that "his" seniority rights had only been established by the contract through bargaining by the unions which he so adamantly refused to support).

The District Court, in denying plaintiff's claims, and in granting summary judgment to TVA and the unions, first dealt with the claim of a breach of the duty of fair representation. In its Findings of Fact, it set forth TVA's long-standing policy that "Responsible unions . . . provide an orderly and effective means through which mutual understanding and unity of purpose can be achieved . . . TVA encourages em-

ployees represented by these unions to become and remain members of such unions; and TVA . . . deals with them and their constituent unions in a manner which recognizes their contribution, and the contribution of the employees they represent, to the TVA program." It further found as a fact that several instances cited by TVA supported its policy in favor of union activity, and additionally found that the relationship between TVA and its employee bargaining representatives had resulted in the promotion to management level positions of several employees who were formerly active in union affairs (Findings of Fact 13, 15, 16, 17, 18).

The District Court concluded that unions who were parties to contracts with TVA were subject to the duty of fair representation, a point that was not contested by petitioners in the Court of Appeals. Its key conclusion, No. 30, stated: "The union preference provision here at issue was the subject of negotiation. The TVA has found, correctly or not, that union membership is an advantage to the TVA. The provision undoubtedly encourages union membership, and discourages 'free riders.' The provision is, therefore, not arbitrary."

This conclusion of law that the provision encouraged union membership and discouraged free riders and was not arbitrary is at the essence of this case.

In its Conclusion 32, the trial court said: "The Court is also of the opinion that, taking into account that this provision was forged in the crucible of collective bargaining, the transfer provision is not unfairly discriminatory." Therefore, there was no breach of the duty of fair representation.

The District Court likewise rejected the constitutional claim of Bowman. It agreed with petitioners that this claim was resolved by *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977). Its Conclusion 37 followed: "The Court is of the opinion the agency interests advanced by this provision are much the same as those promoted by similar provisions in the federal labor law. See *Abood,* 431 U.S. at 224."

The conclusion that the transfer clause was an agency interest much the same as in *Abood* is, we submit, a correct statement of the law.

The Court of Appeals found it unnecessary to reach the constitutional question. It treated the *Abood* decision in Part IV of its opinion in this manner: "The only issue in *Abood* was the constitutionality of the agency shop agreement. This agreement was attacked on the ground that it violated First Amendment rights of non-union teachers. There was no separate claim that the negotiation and enforcement of the agreement violated the union's statutory duty of fair representation."

The Court of Appeals, in Part II.B., took up petitioners' arguments below that if an agency shop provision were valid, a lesser form of union security would likewise pass muster. It then said that the District Court did not adopt petitioners' arguments, when in fact, the recitations set forth earlier demonstrate that the District Court totally concurred with what the unions had maintained before it. The "agency interests" recognized by the trial court were at the core of petitioners' defense.

The Court of Appeals, however, disagreed with the District Court's finding that no discrimination was

involved. The agreement's fatal flaw, as that Court viewed it, in Part III.B., was that it favored "one group of unit employees over another . . ." It went on to say in Part III.C. that, "The duty of fair representation, under these circumstances, prohibited the unions from bargaining for or agreeing to any provision which singles out the employees in the unit who are not union members for disparate treatment."

Having thus characterized the duty of fair representation, the decision was forthcoming that any contractual arrangement for union security, unless it compelled all employees to become payors of dues-equivalency, would be discriminatory because there would be disparate treatment between "members" and "non-members."

Thus, the issues are presented upon which we seek the grant of the writ.

REASONS FOR GRANTING THE WRIT

I. For the first time in the law, the duty of fair representation has been extended to contract negotiations to proscribe a legitimate union interest

An appellate court for the first time has found that a union has breached its duty of fair representation during contract negotiations by making a bargaining compromise related to legitimate trade union goals.

We begin with the fundamental proposition that contracting for union security by inducing the widest possible participation in union affairs is a legitimate and accepted trade union goal in American labor law. In this case, we have an uncontradicted record replete with evidence that petitioners valiantly, but albeit unsuccessfully, sought the widest and most

clearly permissible form of union security in their contracts with TVA. Unable to obtain this goal, the unions settled for something somewhat less—a clause granting preference in transfers to those employees who did join the union, therefore inducing more to join to take advantage of the preference.

The Court of Appeals has now proscribed that lesser resolution. It has held that to adopt such a clause breaches the unions' duty of fair representation to those who have not become members.

No court to this point has ever held that a labor organization may breach its duty of fair representation by engaging in collective bargaining to procure a provision that is not invidious or unrelated to legitimate union objectives. The essential genesis of the doctrine itself arose when a union negotiated with goals that were in fact invidious, such as racial discrimination. *Steele* v. *Louisville & Nashville Ry.*, 323 U.S. 192 (1944), is the classic case. To discriminate based upon race or sex or any basis that is not intrinsically related to the achievement of better wages, hours, and working conditions for the benefit of the whole is invidious conduct.

Here, Bowman and all others who chose not to pay their fair share of the cost of union administration were urged and welcomed to participate. The unions' efforts to compel them to do so with an agency shop that would have cost Bowman his job if he declined to pay is a legitimate union objective. The objective in agreeing to the inducement-by-preference-in-transfer was ultimately the same—securing the maximum participation by payment of dues-equivalency. This is not invidious where all were welcomed—it is more

akin to striving for fullest democratic participation by inducement rather than compulsion.

The duty of fair representation has been applied, of course, in the two separate and distinct areas where unions may be vulnerable: (1) contract negotiations, and (2) contract administration. Because of its frequency, the latter has gained more judicial attention in recent years, in cases flowing from *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and similar cases where a union has been involved in grievance processing. Because of the values inherent in contract negotiations, there is a substantial difference between the two, which the law should recognize, and which this Court certainly has with its fundamental theory of "wide range of reasonableness" that came from *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953), and its progeny.

But whether the duty has arisen in contract negotiations or in grievance administration, this Court has provided us again and again with what must be established to show a breach, but never more clearly than in *Lockridge* v. *Amalgamated Transit Union,* 403 U.S. 274 (1971), where it said:

> The duty of fair representation was judicially evolved, without the participation of the National Labor Relations Board, to enforce fully the important principle that no individual may suffer *invidious, hostile* treatment at the hands of the majority of his co-workers. When such union conduct is proved, it is clear, beyond doubt, that the conduct could not be otherwise regulated by the substantive federal law. And the fact that the doctrine was originally developed and applied by the courts, after passage of the Act, and *carries with it the need to adduce substantial*

> *evidence of discrimination that is intentional, severe and unrelated to the legitimate union objectives* insures that the risk of conflict with the general Congressional policy favoring expedient centralized administration, and remedial action, is slight. (Emphasis supplied.)

The unions' conduct here was not intentionally discriminatory, since its purpose was to encourage all to pay their fair share of the cost of maintaining the bargaining agent. It was not severe, any more than to seek to negotiate any union security agreement is severe. And it was not unrelated to a legitimate union objective—since all it sought was the most obtainable and allowable form of union security.

In the contract-negotiating cases that came after *Steele,* this Court was faced more often with what was permissible than what was not, under the "invidious goals" standards. This is the great significance of *Ford Motor* v. *Huffman, supra,* where the wide range of reasonableness was the bellwether of that holding, with this critical qualification: "subject always to complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338.

The conduct of petitioners in this case was a model of complete good faith and honesty of purpose.

Later cases such as *Aeronautical Lodge* v. *Campbell,* 337 U.S. 522 (1949), and *Humphrey* v. *Moore,* 375 U.S. 335 (1964), were in the same vein. While the former was not a duty of fair representation case, it affirmed the bounds of reasonable that was now the standard of the law when a union negotiated a seniority clause that gave preference to union contract administrators. *Humphrey* showed that there

was no breach of the duty in reaching an agreement when legitimate goals were involved and where there was no invidious treatment of the membership.

The Court of Appeals in its decision has in effect said that honesty of purpose and legitimate union goals are of no consequence when a union agrees to a clause that would have the effect of discriminating against unwilling payors by denying them equality of transfer privileges with payors, altogether ignoring critical reality that in an agency shop contract, the unwilling payor would not confront the transfer-preference clause because he would have suffered the ultimate work-discrimination of loss of his job—a discrimination that has heretofore been held reasonable.

II. The question of whether national labor policy permits a labor organization and an employer to contract for a lesser form of union security than an agency shop or a union shop is an issue of first rank importance that should be reviewed by this Court

On the facts of this case, it is indisputable that the sole purpose of the preference in transfer clause was to adopt a lesser form of union security than an agency shop. The Court of Appeals did not disagree that this was its purpose—it merely held that regardless of purpose, such a lesser clause was invalid and discriminatory. Although it said that the transfer clause was not a "form of agency shop agreement,"[1] it did not dispute why petitioners adopted it.

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[1] The Court of Appeals misperceived petitioners' argument on this point, although it may be a play on words. It was not argued that the transfer provision was a form of agency shop, but rather a lesser form of union security than an agency shop.

The discussion of the Court of Appeals is in jarring disharmony with this Court's teaching in *NLRB* v. *General Motors,* 373 U.S. 734 (1963).

While the issue in *General Motors* arose over the scope of the duty to bargain over an agency shop within the state of Indiana, this Court probed into lesser forms of union security than a union shop because the erring Court of Appeals applied the statutory term of "membership" so literally and totally ignored the national labor policy behind union security arrangements.

In *General Motors,* this Court gave forthright approval to National Labor Relations Board holdings at that time that did approve lesser forms of union security than a requirement of absolute membership. It particularly cited, at 373 U.S. 739, the Board's ruling in *Public Service Co. of Colorado,* 89 NLRB 418, upholding the validity of a monetary service fee of $2 a month.

Then, equally significant, this Court italicized these underscored words in the same opinion paragraph, in quoting from its prior opinion in *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U.S. 301, at 307, in dealing with the purpose of old Sec. 8(3) of the Wagner Act: "The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop *or other forms of union-security agreement.*"

Indeed, this Court went a step further when it candidly remarked: "There is much to be said for the Board's view that, if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act the union shop, then it also intended to preserve the status of less vigorous, less

compulsory contracts which demand less adherence to the union." 373 U.S. at 741.

The provision invalidated in this case is indeed a less vigorous and less compulsory contract than a union shop or agency shop agreement. It was intentionally designed (by TVA at least) to demand less adherence to the union than if an employee were compelled under pain of discharge to pay full dues-equivalency to the union.

Accordingly, the question of how permissible are less vigorous union security provisions than an agency shop comes full front. Also involved is the national labor policy of promoting industrial peace. While this case arises in the public sector, where strikes are forbidden, the principles adopted by the Court of Appeals will surely apply equally to the private sector. If nothing less than a full agency shop is legally permissible, unions may well be required to strike for an agency shop or union shop where they might otherwise be disposed to settle for something "less vigorous," as petitioners did in this case.

Accordingly, the permissibility of contracting for valid interests in union security which are less than an agency shop–union shop is an important issue meriting review by this Court.

III. The treatment by the Court of Appeals of the inherent Constitutional issue in this case undermines this Court's decision in *Abood* v. *Detroit Board of Education*

In Part IV of its opinion, the Court of Appeals pointedly dismissed petitioner's reliance on *Abood* v. *Detroit Board of Education, supra,* by saying that

the only issue in that case was the constitutionality of the agency shop. "There was no separate claim that the negotiation and enforcement of the agreement violated the union's statutory duty of fair representation," it said.

This is a clear signal to litigants in the future to resist even the agency shop on claims of the breach of the duty of fair representation. And why not a union shop as well? Is any union negotiating such a clause breaching its duty to those who desire not to join by imposing discharge upon them for failure to do so?

Abood may not be so casually distinguished. Its foundations go to the central core of what is discriminatory and what is not discriminatory. The Court of Appeals' principal argument for reaching its result was that the contract clause was invalid because it "discriminated" against those like Bowman who would take a free ride and refuse to pay the dues-equivalency fee. We need only say again that the discriminatory impact upon unwilling payors under an agency shop contract is that they lose their jobs while those who do pay do not lose their jobs. If this is discriminatory, *Abood* stands for the proposition that such "discrimination" designed to further union security interests is permissible.

IV. The holding of the Court of Appeals takes away flexibility from parties in collective bargaining in seeking solutions to the important questions of compulsory support for the bargaining agent

Labor union antipathy to the free rider is endemic in American trade unionism. The fairness concept

that all of us should pay our share of the taxation necessary to finance the benefits we obtain is deeply ingrained. Blind hostility to labor organizations of persons like Bowman who want all the rewards (such as seniority rights in transfers) without paying the cost of obtaining those achievements is equally a fact of life. Accommodation between those conflicting views is the law's attempt at peaceful resolution. The ruling below makes it much more difficult to find any area of accommodation between these polar positions. Its restrictive narrowness, like that of its predecessors of more than two decades ago in *General Motors, supra,* focusing on "discriminatory" as a disfavored word rather than analyzing what is and what is not discriminatory in the context of the law of collective bargaining has done a disservice to the critical goals of peaceful and fair resolution of these kinds of disputes, for better or for worse.

This is yet another reason why the writ should be granted.

CONCLUSION

For all the reasons set forth above, the writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CIV-1-80-98

W. EUGENE BOWMAN

- VS. -

TENNESSEE VALLEY AUTHORITY, SALARY POLICY EMPLOYEE PANEL; and,
OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed May 13, 1983]

This is an action by a former employee of the Tennessee Valley Authority (TVA) brought against TVA, the Salary Policy Employee Panel (SPEP)—the collective bargaining agent for TVA salaried employees, and the Office and Professional Employees International Union (OPEIU)—an international labor organization and a member of the SPEP. The action is based upon the plaintiff's allegedly unlawful termination pursuant to his refusal to accept a transfer. The parties have submitted extensive briefs, proposed findings of fact and conclusions of law, and a set of stipulated facts and exhibits, and a trial was conducted to Judge Frank W. Wilson sitting without a jury, in accordance with the agreement of the

parties. Before findings of fact and conclusions of law had been entered, however, Judge Wilson died. This necessitates an examination of Fed. R. Civ. P. 63, which provides:

> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are tiled, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

Rule 63 by its terms applies only to cases where the disability occurs after findings and conclusions have been filed. *Whalen* v. *Ford Motor Credit Co.,* 684 F.2d 272 (4th Cir. 1982); *Thompson* v. *Sawyer,* 678 F.2d 257 (D.C. Cir. 1982); *Arrow-Hart, Inc.* v. *Philip Casey Co.,* 552 F.2d 711 (6th Cir. 1977). This is not such a case. However, the parties have stipulated, unanimously, that the case may be decided by a successor judge (Court File #27). In addition, as such a successor judge, the Court is of the opinion that it is competent to make a just determination of the issues upon the record. Therefore, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the *Federal Rules of Civil Procedure.*

Findings of Fact

1) The Plaintiff is a former employee of the TVA. He was employed in the Land Branch as a land appraiser. This position was classified by the TVA as SA-3, which meant that it was a salaried position in the administrative schedule. This position was subject to the Articles of Agreement between the TVA and the SPEP, and the position was also within the bargaining unit at TVA represented by the OPEIU.

2) The Articles of Agreement is the collective bargaining agreement between the TVA and the defendant unions.

3) The defendant TVA is a governmental corporation created and controlled by the United States government, and is subject to the TVA Act. 16 U.S.C. §§ 831-831dd, *as amended.*

4) The defendant SPEP is an organization of five member labor organizations. Its purpose is to act as the collective bargaining agent for TVA's salary policy employees, of which the plaintiff is one.

5) The defendant OPEIU is an international labor union, and a member of the SPEP, which represents the plaintiff's bargaining unit within TVA.

6) Under the Articles of Agreement, the defendant unions are the exclusive bargaining agents of the employees whom they represent. (Articles of Agreement, art. I. A.)

7) The plaintiff was employed by the TVA in its Chattanooga Office until the summer of 1979. At that time there were three other land appraisers in

the Chattanooga office: Thomas W. Elder, William A. Trundle, and Marion A. Wright.

8) In May, 1979, it was decided by the Chief of the Land Branch, Conro L. Olive, Jr., that one of the land appraisers in the Chattanooga office should be transferred to Florence, Alabama. The procedure for choosing which appraiser to transfer was contained within the Articles of Agreement, Supplementary Agreement 7:

> (1) First, employees at the surplus location are given an opportunity to request transfer to the vacant position. Among those who request transfer, the union members have preference for transfer, and among union members, the one with the earliest current service date has the highest preference.
>
> (2) If no employee at the surplus location requests transfer, an employee at the location may be directed to transfer. In selection among employees at the surplus location for directed transfer, the union members have preference for retention at that location, and among union members the one with the earliest current service date has the highest retention standing.

(Stipulation ¶ 5).

9) On May 11, 1979, Mr. Olive sent a letter to each of the appraisers at the Chattanooga office setting out the procedure to be followed and the need for the transfer of an appraiser to Florence. The letter stated that unless volunteers for transfer were forthcoming, the plaintiff would be directed to transfer because he was the junior non-union member, even though he was

senior to one of the union members. There were no volunteers, and plaintiff was directed to transfer to Florence on or before July 2, 1979. Because of requests by the plaintiff, the reporting date was extended to September 4, 1979.

10. When the plaintiff did not report to Florence, his termination was proposed on September 5, 1979. The plaintiff was terminated effective October 29, 1979, and received notice of this termination from TVA's Director of Property and Services, which notice was dated October 23, 1979.

11) When it was announced that the plaintiff had been selected to be transferred, Thomas W. Elder, the other appraiser who was not a union member, joined the union. Eventually, Marion Wright was transferred because of less TVA seniority, even though Wright had more union seniority.

12) As a consequence of this termination, the plaintiff pursued three separate grievance procedures, all of which were denied. Only the first of these, the one alleging that his transfer was solely because of his status as a non-member of the union, is relevant here.

13) The union preference provision, which occasioned the plaintiff's directed transfer, is a part of the Articles of Agreement. Another part of this agreement, Supplementary Agreement 5, states TVA's, and the union's, purpose in agreeing to such a provision:

> "Membership on the part of employees in an employee union which is or becomes a party to this agreement and participation in the activities

> of the organization are recognized as improving relations between management and employees and promoting employee efficiency and understanding of TVA policy, thereby contributing to the accomplishment of TVA objectives. Therefore, such membership and such participation are among the positive factors of merit and efficiency to be considered in selecting employees for promotion, transfer, and retention."

Such union preference provisions as that in issue here, or, as they are often called, union security provisions, have been a part of the Articles of Agreement since they were first negotiated in 1950.

14) In order to become a union member, it is necessary only for the TVA employee to pay the dues.

15) The policy of the TVA toward labor-management relations is set out in TVA Code III UNION RELATIONS, PM Section 5:

> "The success of TVA's program depends to a large degree on mutual understanding and unity of purpose among employees and between employees and management. Responsible unions recognized by TVA as exclusive representatives of employees in defined bargaining units, and working together through the Salary Policy Employee Panel and the Tennessee Valley Trades and Labor Council, provide an orderly and effective means through which mutual understanding and unity of purpose can be achieved. Through them employees participate in forming and administering the personnel policies and rules un-

der which they work and in increasing interest, initiative, and cooperative effort on behalf of the TVA program. For these reasons TVA encourages employees represented by these unions to become and remain members of such unions; and TVA negotiates agreements with the Salary Policy Employee Panel and the Tennessee Valley Trades and Labor Council and otherwise deals with them and their constituent unions in a manner which recognizes their contribution, and the contribution of the employees they represent, to the TVA program."

(Stipulation ¶ 14, joint exhibit #17).

16) TVA Personnel Manual Instruction, QUALIFICATION APPRAISAL, Union Membership, PM Section 5, explains TVA's position on the application of the union preference transfer provision of Supplementary Agreement 5:

"The purpose of this provision is to remind supervisors, in a work situation where democratic participation of employees through their own organizations is encouraged as a matter of policy, that the response of the individual employee to the opportunity for such participation is one of the factors to be taken into account in selection for promotion, transfer, or retention. * * * Consideration of these factors is not construed as a "reward" for organizational activity, but as relevant to the extent that they have a definite relationship to the efficiency of the working unit or TVA as a whole."

17) There are several instances cited by the TVA as bearing out the correctness of TVA's policy in favor of union activity stated in several provisions of the Articles of Agreement, including the cooperative conference program (Stipulation ¶ 16, and those enumerated in the testimony of Thomas H. Addington, TVA's Chief of Salary Policy Contract Administration.)

18) This relationship between TVA and its employees' bargaining representatives has resulted in the promotion to management level positions of several employees who were formerly active in union activities.

19) The dues paid by members of the OPEIU go to pay the administrative costs, salary and travel expenses of union executives, expenses of members' participation in TVA committees, and the cost of grievances under the Articles of Agreement. There was no evidence that any part of a member's dues was spent on politics of any kind. It is also undisputed that although the OPEIU constitution contains provisions for the discipline of members, no TVA member has ever been so disciplined.

Conclusions of Law

20) This Court has subject matter jurisdiction of this case pursuant to 28 USC §§ 1331(a) & 1337.

Duty of Fair Representation

21) The plaintiff's first contention is that the defendant SPEP violated its statutory duty of fair representation in negotiating the allegedly discrimi-

natory union preference provisions in the Articles of Agreement.

22) The defendant TVA is excepted from the provisions of the National Labor Relations Act. 29 USC § 152(2). Thus the collective bargaining agreement between TVA and the SPEP is not governed by that statute. There can be no statutory duty of fair representation, therefore, in the sense in which that term is usually understood. *See Vaca* v. *Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842, 850 (1967); *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, 199, 65 S.Ct. 226, 89 L.Ed. 178, 181 (1944).

23) The plaintiff argues, however, that a duty of fair representation arises from the TVA Act. 16 USC §§ 831 *et seq.* The plaintiff argues that the TVA relies upon the TVA Act, *id.* § 831b, for authority to bargain collectively with the defendant SPEP, and for authority to recognize the SPEP as the exclusive bargaining agent for the employees in the relevant bargaining unit. If the Act gives TVA the authority to do this, then by analogy to the cases decided under the NLRA and the Railway Labor Act, the TVA Act must also confer upon the union a duty to represent each employee in the bargaining unit fairly and without discrimination.

24) This Court has previously held that unions that are parties to collective bargaining units with the TVA are subject to a duty of fair representation. *Hogan* v. *Local 226, International Brotherhood of Painters & Allied Trades*, CIV-1-82-389, memorandum op. at 6-7 (E.D. Tenn., April 6, 1983). The Court is of the opinion that in this case the union or the SPEP has not breached its duty of fair representation.

25) In determining whether the duty of fair representation was breached, the Court must analyze the question under analogous NLRA cases.

26) The plaintiff argues that by negotiating and enforcing a transfer policy that prefers union over non-union employees, the defendant unions have acted unfairly and discriminatorily in their treatment of non-union employees.

27) Assuming that the defendant unions have a duty of fair representation, that duty

> ". . . includes a[n] . . . obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."

Vaca v. *Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842, 850 (1967).

28) The Court in *Vaca* also defined a breach of the duty of fair representation as occurring "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca,* 386 U.S. at 190, 17 L.Ed.2d at 857; *accord Ruzicka* v. *General Motors Corp.,* 523 F.2d 306, 309, *reh'g denied,* 528 F.2d 912 (6th Cir. 1975).

29) In applying this statement to the facts of an individual case, a court should bear in mind that when a disgruntled employee attacks a contract provision as discriminatory, as here,

> "Because the bargaining process demands compromise of individual worker interests, an employee disadvantaged by a contract has no claim

> of unfair representation against his union unless he can demonstrate actual bad faith in negotiation."

Comment, *Fair Representation in the Arbitration of Grievances—The Eighth Circuit Adds Another Straw*, 47 TENN. L. REV. 631, 632 (1980) (*citing Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953)); *accord Humphrey* v. *Moore*, 375 U.S. 335, 349, 84 S.Ct. 363, 11 L.Ed.2d 370, *reh'g denied*, 376 U.S. 935, 84 S.Ct. 697, 11 L.Ed.2d 655 (1964); *cf., Jones* v. *Trans World Airways, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974). This means that a court should not be hasty to find provision which may have been the subject of intense negotiation to be unlawfully discriminatory.

30) The union preference provision at issue here was the subject of negotiation. The TVA has found, correctly or not, that union membership is an advantage to the TVA. The provision undoubtedly encourages union membership, and discourages "free riders." The provision is, therefore, not arbitrary.

31) There has been no evidence of any bad faith on the part of the union in bargaining for this provision.

32) The Court is also of the opinion that, taking into account that this provision was forged in the crucible of collective bargaining, the transfer provision is not unfairly discriminatory.

33) It is the conclusion of the Court, therefore, that the defendant unions have not breached their duty of fair representation.

First Amendment

34) The plaintiff argues that the union preference provision at issue here acts as an impermissible restraint on the free exercise of his rights under the first amendment of the United States Constitution; more specifically, the plaintiff argues that this provision operates to require him to associate in violation of his right not to associate with those whose views he finds objectionable.

35) The Court finds that this case is controlled by *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, *reh'g denied*, 433 U.S. 915, 97 S.Ct. 2989, 53 L.Ed.2d 1102 (1977).

36) In *Abood* the Court found that a provision requiring employees who were not union members to pay a service fee equal to union dues was not violative of the First Amendment, except to the extent that such fees were used for purposes other than financing union administration and negotiation. *Abood*, 431 U.S. at 222, 235-36, 52 L.Ed.2d 276, 285; *see also Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 238, 76 S.Ct. 714, 100 L.Ed. 1112, *reh'g denied*, 352 U.S. 859, 77 C.Ct. 22, 1 L.Ed.2d 69 (1956) and *Int'l Ass'n of Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961).

37) The Court is of the opinion that the agency interests advanced by this provision are much the same as those promoted by similar provisions in the federal labor law. *See Abood*, 431 U.S. at 224, 52 L. Ed.2d at 277.

38) The evidence in this case is that the union dues are not used for "political" purposes.

39) The facts in this case and those in *Abood* are different. In *Abood* the employee received the benefit of collective bargaining whether a union member or not, but was required to pay. In this case, the employee is not required to pay, but must do so in order to receive the full benefits of collective bargaining. The Court is of the opinion, however, that the system at issue here is no more intrusive upon First Amendment rights than that in *Abood*.

40) The Court concludes that neither the transfer provision nor the plaintiff's termination under it violates the First Amendment.

Fifth Amendment

41) The plaintiff advances two arguments under the Fifth Amendment to the Constitution. First, he argues that he had a property interest in that he had a reasonable expectation of continued employment. This is plainly not the case. TVA employees have no vested interest in continued employment. *See Ramsey* v. *Tennessee Valley Authority*, 502 F.Supp. 230, 232 (E.D. Tenn. 1980).

42) The plaintiff's reliance upon section 6 of the TVA Act is misplaced. That section, requiring the appointments and promotions to be based upon merit and efficiency, does not create a property interest to an individual TVA employee. *Compare Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) *with Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

43) Even though the plaintiff has no property interest in his job, he can argue under the Fifth

Amendment's due process clause that TVA's action was arbitrary and capricious. Since TVA's action in agreeing to the provision at issue is reasonably related to ensuing good relations between management and labor, the Court is of the opinion that it is not arbitrary and capricious.

44) The plaintiff's second argument under the Fifth Amendment is that this section violates the equal protection aspects of the Amendment. *See Mathews* v. *deCastro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884, (1954).

45) Since there is no fundamental right or suspect classification involved here, the provision does not violate equal protection unless it bears no rational relationship to a legitimate government interest. *See San Antonio Independent School Dist.* v. *Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16, *reh'g denied*, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973). As stated above with regard to the due process clause, this provision bears a rational relationship to a legitimate governmental objective; *i.e.*, preserving labor relations and, in TVA's view, facilitating TVA's mission.

46) The Court is therefore of the opinion that the plaintiff's claims under the Fifth Amendment must fail.

Section 6 of the TVA Act

47) The plaintiff's final argument is that the transfer provision violates section 6 of the TVA Act, 16 USC § 831e, which provides:

> "In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board."

48) The Court is of the opinion that even if plaintiff, as an individual employee, had a right of action under this section, TVA has not violated it.

49) As the Court earlier found, the TVA and the unions have agreed that union membership is an indicia of merit and efficiency (SA 5). There is no evidence in the record which would justify ignoring this agreement, or finding it to be contrary to the truth.

50) The plaintiff has stated no claim under 16 USC 831e.

Conclusion

Having entered the above Findings of Fact and Conclusions of Law, the Court is of the opinion that judgment should enter for the defendants.

An appropriate order will enter.

May 19, 1983.

/s/ WILLIAM P. GRAY
United States District Judge

FILED
JAN 16 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1058

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and SALARY POLICY EMPLOYEE PANEL,
Petitioners,

v.

W. EUGENE BOWMAN,
Respondent.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 83-5414

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

W. EUGENE BOWMAN,
Plantiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY; SALARY POLICY EMPLOYEE PANEL; and OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed September 24, 1984

Before: LIVELY, Chief Judge; MARTIN, Circuit Judge; and KRENZLER, District Judge.*

LIVELY, Chief Judge. The question raised by this appeal is whether a collective bargaining agreement which contains neither a union shop nor an agency shop provision may validly grant a preference to union members over non-union employees in avoiding involuntary transfers.

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* The Honorable Alvin I. Krenzler, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

I.

A.

The parties stipulated most of the facts. TVA is a governmental corporation created by the Tennessee Valley Authority Act of 1933, 16 U.S.C. §§ 831-831dd, as amended (The Act). It is empowered by section 3 of the Act, 16 U.S.C. § 831b (1976), to "provide a system of organization to fix responsibility and promote efficiency" among its personnel. Acting pursuant to that section, TVA in 1950 entered into a collective bargaining agreement, the Articles of Agreement, with the defendant Salary Policy Employee Panel (SPEP), which in turn is comprised of several unions. One of SPEP's member unions is the defendant Office and Professional Employees International Union (OPEIU) which is the collective bargaining agent for the unit which included the position held by the plaintiff, Eugene Bowman.

TVA hired Bowman as a real estate appraiser in its Chattanooga, Tennessee office in 1966. He did that work out of the Chattanooga office until the summer of 1979 when TVA decided that one of the four appraisers then assigned to Chattanooga should be transferred to Florence, Alabama.

In deciding who would be transferred, TVA followed a provision in the Articles of Agreement. Supplementary Agreement S-7 of the Articles set out the following procedure for transfer of employees from a "surplus" location to another duty station:

(1) First, employees at the surplus location are given an opportunity to request transfer to the vacant position. Among those who request transfer, the union members have preference for transfer, and among union members, the one with the earliest current service date has the highest preference.

(2) If no employee at the surplus location requests transfer, an employee at the location may be directed to transfer. In selection among employees at

> the surplus location for directed transfer, the union members have preference for retention at that location and among union members the one with the earliest current service date has the highest retention standing.

In accord with the agreement, TVA first asked for volunteers for transfer. None of the four appraisers responded. At that time, two of the four were members of the union. One of the union members, William Trundle, had worked for the TVA about 15 years but had joined the union in the spring of 1979 primarily to acquire preference status in case of transfer. Bowman did not belong to the union and was junior in seniority to the other non-union member. As such he was directed to transfer. Bowman refused to report to Florence and eventually was terminated for refusing to accept the directed transfer.

After TVA notified Bowman he would have to transfer but before it discharged him, the remaining non-union appraiser, Thomas W. Elder, applied for and obtained membership in OPEIU. Thus all three appraisers were union members at the time Bowman was fired. TVA then directed Marion Wright who had the most union seniority but the least seniority with TVA to transfer to Florence. Bowman had greater seniority than Wright.

The parties also stipulated that TVA's policy is that recognition of responsible unions as exclusive collective bargaining agents for its employees provides an orderly and effective means of achieving TVA's programs. The union preference provision, which has been part of the Articles of Agreement since 1950, is considered a form of union security for SPEP's member unions. TVA deems the purpose of the provision is to encourage employees to participate in their unions, and thereby improve employee relations. It considers union membership and participation to be "positive factors of merit and efficiency" relevant to selecting employees for transfer, promo-

tion and retention. However, TVA has rejected proposals for other forms of union security — a union shop or agency shop.

B.

Bowman was discharged by TVA on October 29, 1979, when he refused to accept the transfer from Chattanooga to Florence. He pursued grievance procedures on three complaints, including the one involved in this suit, that he was terminated solely because he was not a member of the union. After all grievances were denied he filed this action in federal district court, naming as defendants his employer, TVA, and his collective bargaining agents, SPEP and OPEIU. In his complaint Bowman challenged the provision of the collective bargaining agreement which gives preference to union members over non-member employees in the same bargaining unit in avoiding involuntary transfers. He alleged that the union preference provision constituted a breach of the unions' duty of fair representation owed to all members of the bargaining unit, union members and non-members alike. Bowman also charged that the union preference provision violated rights guaranteed to him by the First and Fifth Amendments to the United States Constitution.

Upon agreement of the parties, the case was tried without a jury. The district court entered findings of fact and conclusions of law, deciding that Bowman failed to establish any constitutional violations or breach of a duty of fair representation. It entered judgment for the defendants and dismissed the action on the merits. The findings of fact largely reflected the stipulations of the parties.

II.

If we are able to decide this appeal on non-constitutional grounds we will do so and will not reach the First and Fifth Amendment issues. In proceeding this way we follow the longstanding practice of the Supreme Court as set forth by

Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case," *quoting Burton* v. *United States*, 196 U.S. 283, 295.), and of this court, *e.g.*, *Seals* v. *Quarterly County Court of Madison County, Tennessee*, 526 F.2d 216, 219 (6th Cir. 1975). Accordingly, we look first at Bowman's claim that the district court erred in finding that there had been no violation of a duty of fair representation.

A.

The duty of fair representation is one which arises as a corollary to a union's right to act as the exclusive representative of a group of employees. This duty is not stated explicitly in any of the federal labor relations laws, but has been found by the Supreme Court to arise by implication from the right of exclusive representation granted by the Railway Labor Act, as amended, 45 U.S.C. § 152, et seq., and the National Labor Relations Act, as amended, 29 U.S.C. § 141, et seq. The seminal decision of the Supreme Court on the duty of fair representation is *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). There the railroad employer and the union representing locomotive firemen agreed to a provision in a collective bargaining agreement which had the effect of greatly limiting the employment opportunities of Negro firemen who were not members of the union. The Supreme Court concluded that "Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Id.* at 199. The Court pointed out that a minority of the craft could not choose their own bargaining representative or bargain individually under the Railway Labor Act. It likened the duty of the union to

represent all members of the craft, whether members of the union or not, at least to the extent of not discriminating against them, to the duty of a legislature to treat equally with all for whom it legislates. *Id.* at 198.

Steele involved racial discrimination by a union operating under the Railway Labor Act, but the principles laid down there have been applied to all types of discrimination by labor unions. This was made clear in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), where there were no charges that the alleged discrimination was based on racial animus and where the controlling statute was the National Labor Relations Act. *Vaca* v. *Sipes* involved the failure of a union to carry a discharged employee's grievance to the final step of arbitration under the collective bargaining agreement. Harking back to *Steele*, the Court described the duty of fair representation as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 386 U.S. at 182. The Court then set forth the criteria for finding a union liable for a failure of fair representation:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

Id. at 190.

B.

Under the Tennessee Valley Authority Act, 16 U.S.C. §831b, TVA is exempt from the provisions of federal civil service laws and pursuant to the definition sections of the National Labor Relations Act, 29 U.S.C. §§ 142(3), 152(2), it is exempt from that Act. However, neither TVA nor the unions contest the district court's conclusion that the unions are subject to a duty of fair representation. This is so because TVA's authority

to bargain collectively with the unions as the exclusive representatives of employees in Bowman's classification derives from provisions of the TVA Act which broadly empower TVA to design its own system of personnel management. Since the duty of fair representation arises by implication as a necessary corollary to the right of exclusive representation, the unions are subject to the same obligation toward non-union members of the employee unit as if they were bargaining under the Railway Labor Act or the National Labor Relations Act.

The defendants argue that the union preference clause in the Articles of Agreement is not an illegal provision which discriminates against employees who are not union members. Rather, they assert, it is a limited union security provision. Other union security provisions are valid, they argue, and the one at issue here is less burdensome on employees than either a union shop or an agency shop. Under a union shop agreement all employees must join the union representing their bargaining unit within a stated period after being hired or suffer discharge. In an agency shop all employees in a covered unit must pay to the union under penalty of discharge fees equal to their share of the cost to the union of carrying out its duties and responsibilities as their representative. The defendants contend that if provisions which require membership in a union or payment to a union as a condition of retaining employment are valid, surely one which merely grants a special status to union members with respect to involuntary transfers will pass muster.

The district court did not adopt the defendant's arguments. Rather, it cited *Vaca* v. *Sipes*, and discussed the criteria set forth in that decision. The court found that the agreement for union preference was not arbitrary because it served legitimate purposes of the parties (union membership promotes better cooperation by employees with TVA policies and practices, greater efficiency in operations, eliminates "free riders," and offers a vehicle for advancement from employee status to management). The district court also found no evidence of

bad faith on the part of the union in bargaining for the transfer preference, and "taking into account that this provision was forged in the crucible of collective bargaining, the transfer provision is not unfairly discriminatory."

III.

A.

We consider the defendants' arguments before analyzing the district court's reasoning. It is true that union shops were prohibited under the Railway Labor Act when the *Steele* case was decided because union shops were equated at the time with company unions. However, in 1950 Congress amended the RLA to permit union shop agreements since by then most railroad employees belonged to independent unions and Congress was persuaded that non-union employees should not be permitted a "free ride" by enjoying the benefits of collective bargaining without paying any of the costs. S. Rep. No. 2262, 81st Cong., 2d Sess., *reprinted* in 1950 U.S. Code Cong. & Ad. News 4321; H.R. Rep. No. 2811, 81st Cong., 2d Sess. 4, *quoted in International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 762 (1961) and *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 231 (1956).

The Supreme Court upheld the provisions of the 1950 amendments, *Hanson*, 351 U.S. at 238, but construed the statutory authorization for compulsory unionism as requiring payment by unwilling union members only of the costs directly related to collective bargaining and as precluding exaction of payment for support of political causes, *Street*, 367 U.S. at 768-69. In *Street*, the Court repeated that in *Steele* it had required a union chosen by the majority of employees as the exclusive agent of all employees to fairly represent all, whether members of the union or not. *Id.* at 761. The judicially implied duty of fair representation first articulated in *Steele* was one of the bases for congressional acceptance of the union shop amendment. It is because a union which is an exclusive

bargaining agent is prohibited from discriminating against any member of the unit it represents that it is permitted to negotiate an agreement which requires all members of the bargaining unit to support its bargaining activities with payments of dues or service fees. The corollary which *Steele* found to exist between the privilege of exclusive representation and the duty of fair representation was cited to justify the union security device of the union shop.

The fact that the defendants might have negotiated a union shop or agency shop agreement, but chose not to do so, does not relieve the unions of their responsibility to fairly represent those employees who have chosen not to join the union. Counsel for SPEP and OPEIU argues that the transfer preference provision is actually a form of agency shop agreement. That is obviously not the case. Bowman was not required to make payments to the unions as a condition of holding his job, and he could not have been fired for failing to make such payments. While the courts have said that a person can be required to make payments to his or her representative to cover the costs of the benefits enjoyed by all, no court has said that a union which fails to obtain a union shop or agency shop agreement may treat non-union members of a bargaining unit in a discriminatory manner. *Steele* and the decisions which have followed it prohibit such treatment.

B.

The district court appears to have held that no discrimination was involved in regard to the union preference provision because it was "forged in the crucible of collective bargaining," and that this finding determines the issue of fair representation. We find error in this reasoning in two respects. First, the fact that a provision which favors some members of a unit over others results from collective bargaining does not guarantee that it will avoid being condemned as discriminatory. The duty of fair representation requires the representa-

tive to bargain for a contract which does not discriminate against minority members of the unit. *Steele*, 323 U.S. at 201. An exclusive bargaining representative has a duty "fairly to represent all of those employees [in the bargaining unit], *both in its collective bargaining* with [the employer] . . . and in its enforcement of the resulting collective bargaining agreement." *Vaca* v. *Sipes*, 386 U.S. at 177 (citations omitted). See also *Journeymen Pipe Fitters Local 392* v. *N.L.R.B.*, 712 F.2d 225, 228 (6th Cir. 1983) ("As the exclusive labor representative of employees in a bargaining unit, a union has a statutorily-imposed duty to fairly represent all of the employees, union members or not, *in the collective bargaining process* and in the administration of the resulting labor contract."). (Emphasis supplied in both quotations.) The duty of fair representation arises first in the negotiation of a collective bargaining agreement, and the fact that an employer and a union agree to a provision which favors one group of unit employees over another does not immunize that provision from attack on the ground of unfair representation.

The second flaw in the district court's analysis lies in its emphasis on bad faith. In its opinion the district court quoted from a law review comment to the effect that "an employee disadvantaged by a contract has no claim of unfair representation against his union unless he can demonstrate actual bad faith in negotiation." The quoted language does not accurately reflect the duty of fair representation as interpreted by this court. In *Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096, 1103 (6th Cir. 1981), the court held that bad faith or fraud is not a necessary element of a charge against a union for violation of its duty of fair representation. Similarly, in *Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 310 (6th Cir. 1975), *cert. denied*, — U.S. —, 104 S. Ct. 424 (1983), the court stated:

> We believe that the District Court misread *Vaca* when it held that "bad faith" must be read into the separate and independent standards of "arbitrary" or "discrimina-

> tory" treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation.

We find the same error in the district court's treatment of the separate standards in the present case.

C.

We conclude that the union preference provision does discriminate unlawfully against Bowman and other members of the bargaining unit who do not belong to the unions. The unions enjoy the position of exclusive representatives of employees in Bowman's classification under a contract which permits membership within the unit regardless of whether an employee has chosen to affiliate with a union. The duty of fair representation, under these circumstances, prohibited the unions from bargaining for or agreeing to any provision which singles out the employees in the unit who are not union members for disparate treatment. As the court stated in *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 198-99 (4th Cir. 1963):

> At least in the absence of a valid union shop agreement — there is no such agreement here — disparate treatment in representation cannot be tolerated when based on the disadvantaged individual's or group's non-membership in the statutory bargaining agent.

In effect the union preference provision denied Bowman, in the instance of an involuntary transfer, of the benefit of seniority which he had acquired in 13 years of employment by TVA. Absent this provision he could have required the transfer to Florence of one of the appraisers with less seniority. As the court in *Jones* v. *Trans World Airlines*, 495 F.2d 790, 797 (2d Cir. 1974), stated:

> Discrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates

the union's duty to represent fairly all members of the bargaining unit.

IV.

Both TVA and the unions insist that this case must be decided on the basis of Bowman's constitutional claims. We disagree. A union which represents groups of employees has a duty of fair representation which derives from its statutory right to be the exclusive representative of all the covered employees, not from a constitutional right of the employees. An act of a union may violate both its duty of fair representation and some constitutional right of the disadvantaged employees, but this is not necessarily true in all cases. Both defendants maintain that this case is controlled in every aspect by *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood* the Supreme Court upheld an agency shop agreement to the extent that it required employees who were in the bargaining unit but were not union members to pay "service charges" to the union for "collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232. The only issue in *Abood* was the constitutionality of this agency shop agreement. This agreement was attacked on the ground that it violated First Amendment rights of non-union teachers. There was no separate claim that the negotiation and enforcement of the agreement violated the union's statutory duty of fair representation. *Abood* was concerned only with the constitutional validity of a particular agreement, an issue we do not reach because this case can be decided on a non-constitutional ground which was pled and argued as a discrete claim for relief.

CONCLUSION

In his complaint the plaintiff sought declaratory and injunctive relief, reinstatement with seniority rights and damages. Plaintiff is entitled to declaratory and injunctive relief

because of the invalidity of the union preference clause in the Articles of Agreement. He is also entitled to reinstatement since his discharge resulted solely from his refusal to comply with an order based on an unlawful provision of the Articles. The case must be remanded for a determination of damages in light of the Supreme Court's recent decision in *Bowen* v. *United States Postal Service*, — U.S. —, 103 S. Ct. 588 (1983). In *Bowen* the Court held that a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by the union's breach of its duty of fair representation. Prior to *Bowen* this court stated in *Farmer* v. *ARA Services, Inc.*, 660 F.2d at 1107:

> Where, as in the present case, the union's breach of its statutory duty results also from its wrongful participation in the breach of contract or from the negotiation of discriminatory contractual provisions, then the union may be held jointly and severally liable with the employer or its liability for damages may be apportioned to the extent that it shares responsibility for the damage.

The judgment of the district court is reversed and the cause is remanded for further proceedings as required by this opinion. The plaintiff will recover his costs on appeal.

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(3)

No. 84-1058

In the Supreme Court of the United States

OCTOBER TERM, 1984

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, ET AL., PETITIONERS

v.

W. EUGENE BOWMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY

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QUESTION PRESENTED

Whether the court of appeals erred in applying to a collective bargaining agreement a judicially-implied duty arising under statutes from which the parties are expressly exempt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. 1a-13a)[1] is reported at 744 F.2d 1207. The opinion of the district court (Pet. App. 1a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1984. The petition for a writ of certiorari was filed as of December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. Supp. App." refers to the separately bound Appendix to the petition for a writ of certiorari.

STATEMENT

1. The Tennessee Valley Authority (TVA) is a wholly-owned government corporation created by the TVA Act of 1933, 16 U.S.C. 831-831dd. See *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 315 n.1 (1936). Congress has exempted TVA's employment relationships with its employees from the Civil Service laws and regulations, directing in Section 3 of the TVA Act, 16 U.S.C. 831b (emphasis added) that:

> The [TVA] board [of directors] shall *without regard to the provisions of Civil Service laws applicable to officers and employees of the United States,* appoint such * * * employees * * * as are necessary for the transaction of its business, fix their compensation, define their duties, and *provide a system of organization to fix responsibility and promote efficiency.* Any appointee of the board may be removed in the discretion of the board.

Section 6 of the Act further prohibits any "political test or qualification" in TVA employment, requiring TVA to make "appointments and promotions" on the basis of "merit and efficiency" (16 U.S.C. 831e).

These congressional mandates have remained unchanged since their enactment in 1933. 48 Stat. 59-60, 63. In the interim, Congress has confirmed TVA's broad authority, "subject only to the provisions of the [TVA] Act of 1933, as amended," to enter into "such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary" (55 Stat. 775). Congress further expressly excluded TVA, as a wholly-owned government corporation, from the applicability of the National Labor Relations Act and the Labor Management Relations Act, which regulate the terms and conditions of private sector employment (29 U.S.C. 142(3), 152(2)). TVA

was also expressly exempted from the provisions of the Civil Service Reform Act of 1978, which governs the terms and provisions of labor management relations and collective bargaining between most agencies and employees of the federal government (5 U.S.C. 7103(a)(3)(E)).

2. TVA first entered into collective bargaining with employees in 1935, following adoption of its "[E]mployee [R]elationship [P]olicy." See S. Doc. No. 56, 76th Cong., 1st Sess. 56 (1939); 1936 TVA Ann. Rep. 65-66, 304-307.[2] This formal policy permitted employees to organize and bargain with TVA, although "no employee is required to join or refrain from joining an organization." S. Doc. No. 56, *supra,* at 56; S. Rep. 372, 81st Cong., 1st Sess. 10 (1949).[3] Such bargaining led to a contract with unions representing TVA's blue collar or "trades and labor" employees, acting through the Tennessee Valley Trades and Labor Council, in 1940 (S. Rep. 372, *supra,* at 11). By the late 1940's, TVA's experience led to the adoption of a unilateral policy that participation in established labor-management relations, such as membership in a union affiliated with the Council, was a "positive factor[ ] of merit and efficiency" to be considered "in selecting employees for * * * transfer," although such membership was "not a condition of continued employment" (S. Rep. 372, *supra,* at 16). In 1950, after it adopted this policy, TVA entered into the negotiated contract at issue here, the Articles of Agreement, which covers nonmanagement white collar or "salary policy" employees (19[illegible] TVA Ann. Rep. 53). The Articles of Agreement reflect TVA's policy that in making transfer

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[2]S. Doc. No. 56 is the report of a Joint Investigating Committee created in 1938. 52 Stat. 156.

[3]S. Rep. 372 is a report on "Labor-Management Relations in TVA" by the Joint Committee on Labor-Management Relations created by Title IV of the Labor-Management Relations Act. See 61 Stat. 160-161.

decisions union members would be given a preference. Accordingly, union members have priority when volunteering to transfer, and in the event of an involuntary transfer, union members have a preference to remain at their original location.

3. In 1979, respondent Bowman was one of four land appraisers at his grade level working in TVA's offices in Chattanooga, Tennessee. When a need arose to transfer one of these appraisers to Florence, Alabama, Bowman was selected in accordance with the terms of the Articles of Agreement.[4] After he refused to report to Alabama, Bowman was terminated, effective October 29, 1979.

He then sued for reinstatement, alleging two theories for recovery against TVA: (1) that the union preference violated the "merit and efficiency" principles of the TVA Act, and (2) that the preference violated his rights under the First Amendment to freedom of association, and his rights under the Fifth Amendment to equal protection. The unions were joined in this constitutional claim. As a separate, nonconstitutional claim solely against the union defendants, Bowman contended that they had breached an implied duty of fair representation by acceding to the union preference provision.

Following a trial, the district court rejected all of Bowman's claims. The court expressly found that union membership was viewed by TVA as an indicator of "merit and efficiency" (Pet. App. 5a-8a). The district court further found that in order to become a union member a TVA employee need only pay dues (which were used solely for

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[4]At the time, two of the four appraisers were union members. After none of the appraisers volunteered to transfer, the junior nonunion member (Bowman) was chosen. The procedures for involuntary transfer are set out at Pet. App. 4a.

administering the Agreement) (*id.* at 6a, 8a).[5] Concluding that the preference provision "bears a rational relationship to a legitimate governmental objective; *i.e.*, preserving labor relations and, in TVA's view, facilitating TVA's mission" (Pet. App. 14a) and that "[TVA's] interests advanced by this provision are much the same as those promoted by similar provisions in the federal labor law" (*id.* at 12a), the district court upheld the union preference provision.

The district court also rejected the "fair representation" claim against the unions. Noting that TVA had concluded that "union membership is an advantage to the TVA," and that the provision "encourages union membership, and discourages 'free riders,' " the court found the preference provision "not arbitrary," "not unfairly discriminatory," and not the product of bad faith in bargaining (Pet. App. 11a).

5. The United States Court of Appeals for the Sixth Circuit reversed. The court of appeals did not reach the constitutional issue, stating that the case "can be decided on a non-constitutional ground which was pled and argued as a discrete claim for relief" (Pet. Supp. App. 12a). Nor did the court of appeals resolve the statutory question whether the union preference violated the TVA Act's "merit and efficiency" principle, 16 U.S.C. 831e. Instead, the court reversed solely because it found the preference provision to be a violation of the "judicially implied duty of fair representation" (Pet. Supp. App. 8a). The court said that (*id.* at 11a):

> [T]he union preference provision does discriminate unlawfully against Bowman and other members of the bargaining unit who do not belong to the unions. The unions enjoy the position of exclusive representatives

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[5]In fact, the Agreement shows that even less is required: If an employee applies but is rejected by the union for membership, TVA still views the employee as a union member entitled to the preference (Jt. Exh. 1a, at 58).

> of employees in Bowman's classification under a contract which permits membership within the unit regardless of whether an employee has chosen to affiliate with a union. The duty of fair representation, under these circumstances, prohibited the unions from bargaining for or agreeing to any provision which singles out the employees in the unit who are not union members for disparate treatment.

Accordingly, the court directed that respondent be reinstated and remanded for a trial to allocate damages.

ARGUMENT

In our view, the court of appeals' judgment is erroneous. However, the decision is written narrowly and it therefore may have only a limited effect. For this reason we have not felt justified in seeking review by this Court at the present time.

1. The court's principal error was its reliance on statutory restrictions Congress has expressly stated have no application to TVA's labor relations. The National Labor Relations Act prohibits private sector employers from "encourag[ing] or discourag[ing] membership in any labor organization" by any "discrimination in regard to * * * any term or condition of employment" (29 U.S.C. 158(a)(3)). A "labor organization" is under a similar statutory prohibition against "caus[ing] or attempt[ing] to cause an employer" to take such acts (29 U.S.C. 158(b)(2)). But Congress has exempted TVA from these prohibitions by excluding it from the definition of the term "employer" subject to the statute (29 U.S.C. 142(3), 152(2)).[6] Congress has also expressly excluded TVA and these unions (5 U.S.C.

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[6]Congress similarly excluded the unions here from being considered "labor organization[s]" in their bargaining with TVA. See 29 U.S.C. 142(3), 152(5).

7103(a)(3)(E) and (4)) from the similar prohibitions governing federal "agenc[ies]" and "labor organization[s]" dealing with such agencies (5 U.S.C. 7116).

In exercising its statutory power to "provide a system of organization to fix responsibility and promote efficiency," TVA specifically found that union membership promoted TVA's mission. Accordingly, TVA granted a limited "preference" to such employees in transfer situations. No provision of the TVA Act prohibits TVA from taking such action. Any detriment to nonunion employees was minimal — they still had their jobs, at their same pay rates and with all the same benefits, but simply at another location (with TVA paying their moving expenses), and they were and are under no compulsion to join a union to keep their jobs or any of these benefits.

2. Congress has long been aware of TVA's transfer preference practice and has never expressed its disapproval. In 1949, the report of the Joint Committee on Labor-Management Relations (S. Rep. 372, 81st Cong., 1st Sess. (1949)), advised Congress of TVA's labor practices. The Joint Committee noted (S. Rep. 372, *supra,* at 12-13) that TVA had previously refused a union shop agreement and fully described TVA's unilateral practice of granting union preference (*id.* at 16 (emphasis added)):

> TVA feels that joint labor-management programs are a constructive contribution to job efficiency. Therefore, supervisors are to give recognition to support of and participation in established labor-management relationships on the part of employees as one of the positive factors of merit and efficiency considered in selecting employees for promotion, transfer, or retention in employment. This means that *in selecting employees for* promotion, retention at time of lay-off or *transfer*,

supervisors and personnel officers will consider support of and participation in established labor-management relationships as one of the factors to be taken into consideration along with the factors of ability, experience, and training.

TVA assumes that supervisors who initiate personnel actions resulting in promotion, transfer, or retention at time of lay-off are familiar with the interests of employees in established labor-management relationships as expressed in serving as job steward, participation in the work of training, cooperative, or other joint committees, other participation in joint programs, and *membership in unions affiliated with the council.* Upon request or at their own initiative, personnel officers will advise supervisors on this point.

If employees ask for advice concerning union membership, they are advised that *TVA looks with favor upon affiliation with unions signatory to the general agreement as being conducive to the efficiency of the job. Union membership, however, is not a condition of continued employment.*

Congress has many times since revisited the labor statutes and the TVA Act, but has never amended them to proscribe these practices by TVA. This consistent acquiescence constitutes strong evidence that TVA has correctly discerned congressional intent. See, *e.g., United States* v. *Rutherford,* 442 U.S. 544, 554 n.10 (1979).

3. This Court has made it clear that the federal employment relationship is one governed basically by Congress, in which the courts should be hesitant to intrude by creating common law rights. *E.g., United States* v. *Standard Oil Co.,* 332 U.S. 301 (1947); *United States* v. *Gilman,* 347 U.S. 507 (1954). The Court stated in *Gilman* that (347 U.S. at 511-513 (footnote omitted)):

> Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.[7]

Here, of course, the situation is even more compelling. Congress has spoken about TVA, and in a manner contrary to the Sixth Circuit's view.

4. Although the court of appeals' judgment is in error, we cannot conclude that further review is warranted at this time. The decision focuses on a duty of fair representation imposed only on the unions. Respondent Bowman did not present and the court of appeals did not reach the statutory question whether the preference provision violated the TVA Act's "merit and efficiency" principle, 16 U.S.C. 831e. Moreover, in the private sector, the union security arrangements at issue here would be deemed unlawful under 29 U.S.C. 158(a)(3), or, if implemented at the behest of a

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[7]See also *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 234 (1956) (emphasis added):

> The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. *The decision rests with the policy makers, not with the judiciary.*

union, under 29 U.S.C. 158(b)(2).[8] These factors lead us to conclude, with some reluctance, that this case does not meet the usual criteria justifying a grant of certiorari.

Respectfully submitted.

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FEBRUARY 1985

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[8]In the Taft-Hartley Amendments of 1947, Congress made a clear policy choice in favor of voluntary unionism, abolishing the provision of the National Labor Relations Act that permitted unions and employers to enter into agreements requiring that employees become union members as a condition of employment. See 93 Cong. Rec. 4885 (1947) (remarks of Sen. Ball). Congress permitted only union security agreements that required employees to become a "member" of the union after 30 days of employment. See S. Rep. 105, 80th Cong., 1st Sess. Pt. 1, at 7 (1947); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40-41 (1954). But only financial membership could be required. 29 U.S.C. 158(a)(3) and (b)(2); *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). This Court has characterized the union security arrangement described in the statute as "[t]he only limitation Congress has chosen to impose" on employees' right to "join unions * * * or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union* v. *NLRB*, 347 U.S. at 40.

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No. 84-1058

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OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and SALARY POLICY EMPLOYEE PANEL,

Petitioners,

v.

W. EUGENE BOWMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether a union breaches its statutory duty of fair representation by negotiating and enforcing a collective-bargaining agreement that utilizes union membership as the sole criterion for granting union members preference over non-union employees regarding voluntary or involuntary duty station transfers.

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No. 84-1058

IN THE

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OCTOBER TERM, 1984

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, and SALARY POLICY EMPLOYEE PANEL,

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v.

W. EUGENE BOWMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984) and, as respondent's counsel has not received a copy of the petitioners' supplemental appendix referred to in the Brief For The Tennessee Valley Authority, its full text is contained in the appendix hereto. (Resp. App. 1a-17a) The opinion of the United States District Court for the Eastern District of Tennessee is unreported and is set forth in the petitioners' appendix (Pet. App. 1a-15a).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was dated and entered on September 24, 1984, reversing the District Court's order and judgment of dismissal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED[1]

Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831-831dd, as amended.

STATEMENT OF THE CASE

The Tennessee Valley Authority (TVA) is a wholly-owned government corporation created by the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831-831dd (1982).

The Salary Policy Employee Panel (Panel) is the bargaining agent of the Office and Professional Employees

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[1] In the proceedings below the respondent argued the union preference clauses of the collective-bargaining agreement deprived him of his *constitutional* rights to freedom of association and equal protection under the law. U.S. Const. amend. I and V. The Court of Appeals did not reach respondent's constitutional claims and decided the case on statutory grounds. In order to ensure that his constitutional claims are not waived, *see Wiener v. United States*, 357 U.S. 349, 351 n. (1958), the respondent reasserts them at this time. These constitutional claims, though not formally addressed by the Court of Appeals, provide alternate grounds for denying the writ of certiorari. Should the Court grant the writ of certiorari, respondent requests permission to brief his constitutional claims under the First and Fifth Amendments to the Constitution.

International Union (Union) in conducting collective bargaining with TVA.

Pursuant to Section 3 of the Tennessee Valley Authority Act, 16 U.S.C. § 831b (1982), to "provide a system of organization to fix responsibility and promote efficiency," TVA entered into a collective bargaining agreement (Articles of Agreement) with the Panel.

The Articles of Agreement state in Supplementary Agreement 5A (S-5:A) that "[t]he selection of personnel for appointment, placement, and retention in positions within TVA is made on the basis of merit and efficiency in accordance with the TVA Act and on the basis of the Veterans' Preference Act of 1944, and other applicable Federal laws and regulations."

Supplementary Agreement 5B (S-5:B) of the Articles of Agreement states that: "[S]election for promotion or transfer (except transfer under Supplementary Agreement: S-7:C) is made on the basis of merit and efficiency: among employees who are relatively equal in merit and efficiency, the employee with the most TVA service is selected."

Supplementary Agreement 7C (S-7:C) of the Articles of Agreement provides that vacant positions may be filled by voluntary or directed transfer under the following procedures:

> (1) First, employees at the surplus location are given an opportunity to request transfer to the vacant position. Among those who request transfer, the *union members have preference* for transfer, and

> among union members, the one with the earliest current service date has the highest preference.
>
> (2) If no employee at the surplus location requests transfer, an employee at the location may be directed to transfer. In selection among employees at the surplus location for directed transfer, the *union members have preference* for retention at that location, and among union members the one with the earliest current service date has the highest retention standing. * * *

(Emphasis supplied)

Respondent, W. Eugene Bowman, was one of four real estate appraisers employed by TVA at its Chattanooga, Tennessee duty station when TVA announced that one of the appraisers was to be transferred to Florence, Alabama. The transfer was to be made in accordance with the Articles of Agreement provisions granting union members a preference for transfer and for retention. There were no volunteers for the transfer to Florence; therefore, Mr. Bowman, who had more seniority than one of the union members, was directed to transfer solely on the basis that he was not a union member. Mr. Bowman would not have been directed to transfer but for the union preference provisions of the Articles of Agreement.

Mr. Bowman filed a grievance protesting his transfer because it was directed solely on the basis that he was not a union member pursuant to the provisions in Supplementary Agreement 7. The grievance was futile because of Supplementary Agreement 11 which states:

"[a] grievance may not be filed to change an established policy, standard, or procedure. Changes in these are made only through negotiations." Therefore, the respondent's grievance was denied, and he was discharged by TVA for not accepting the transfer to Florence, Alabama.

The jurisdiction of the district court was invoked under 28 U.S.C. § 1337 (1982) because the Tennessee Valley Authority Act of 1933 is an Act of Congress regulating commerce.

The respondent brought the instant action in the United States District Court for the Eastern District of Tennessee, Southern Division, alleging that the Panel and Union violated their duty of fair representation by negotiating and enforcing the union preference provisions in the Articles of Agreement; and that TVA violated respondent's right to freedom of speech and association guaranteed by the First Amendment and deprived him of his liberty and property in violation of the Fifth Amendment.

The Order and Judgment of Dismissal entered by the District Court was reversed by the United States Court of Appeals for the Sixth Circuit. The Court did not address the constitutional issues; it decided the case on the non-constitutional grounds that the Union had violated its duty of fair representation. The Court ordered declaratory and injunctive relief because of the invalidity of the union preference provision in the Articles of Agreement. The Court further ordered Mr. Bowman's reinstatement. The case was remanded for a determination of damages.

REASONS WHY WRIT SHOULD BE DENIED

I. TVA has never raised in the courts below or in the record the issue set forth in its question presented.

TVA has utilized the statutory basis of the Tennessee Valley Authority Act, 16 U.S.C. § 831b (1982), to negotiate the Articles of Agreement with the Panel, and the parties have so stipulated. (R.25) The Articles of Agreement recognize the Panel as the exclusive representative of the employees similarly situated to the respondent.

The union's duty of fair representation was first established in the Railway Labor Act case of *Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192 (1944); thereafter, the duty was held applicable to the National Labor Relations Act cases. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955).

In *Steele v. Louisville & Nashville Railway Co., supra*, the Court noted that if the Railway Labor Act granted exclusive representation to a union "without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature, which is subject to constitutional limitations. . . " *Id.* at 198. However, the Court did not reach the constitutional question as it based its decision on the Act's implicit expression of the aim of Congress to impose the duty of fair representation on the exclusive representative.

In the instant case, the Court of Appeals stated that

"neither TVA nor the unions contest the district court's conclusion that the unions are subject to a duty of fair representation. This is so because TVA's authority to bargain collectively with the unions as the exclusive representatives of employees in Bowman's classification derives from provisions of the TVA Act which broadly empower TVA to design its own system of personnel management." (Resp. App. 8a-9a)

The parties stipulated that the Tennessee Valley Authority Act was the basis for TVA entering into the Articles of Agreement with the Panel. If the Act gives TVA the authority to do this, then the Act must also implicitly impose on the Panel a duty of fair representation. The contention that TVA does not have the authority, and the Union the corollary duty, has not been previously raised at any stage of this case until the brief of TVA was filed with this Court.

II. The duty of fair representation is applicable to contract negotiations and it prohibits discrimination against an employee solely because he is not a union member.

A union breaches its statutory duty of fair representation "only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith," *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), and this duty is applicable "during the negotiation, administration and enforcement of collective bargaining agreements." *Electrical Workers v. Faust*, 442 U.S. 47 (1979).

Although unions have a certain degree of flexibility in

balancing the competing interests of the employees it represents, this flexibility does not grant them the power to discriminate on the sole basis of union membership. *Radio Officers Union v. NLRB*, 347 U.S. 17, 46-48 (1954); *Jones v. Trans World Airlines*, 495 F.2d 790, 792 (2d Cir. 1974); *NLRB v. International Brotherhood of Electrical Workers*, 597 F.2d 1326 (10th Cir. 1979); *Robertson v. NLRB*, 597 F.2d 1331 (10th Cir. 1979); *Del Casal v. Eastern Airlines*, 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981); *National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402 (D.C. Cir. 1983).

Petitioners attempt to muddy the waters by masking the discriminatory union preference provisions as "a less vigorous form of union security than an agency shop." (Pet. i) This contention was soundly rejected by the Court of Appeals when it stated: "[t]hat is obviously not the case." (Resp. App. 12a)

To bolster their argument, petitioners rely on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Their reliance is misplaced. *Abood* involved a challenge to the validity of a state statute which permitted a governmental agency and a labor union to negotiate a union-security provision that required bargaining unit members who were not members of the union to pay a service fee to the union. This service fee was equal to full union dues. The collective-bargaining agreement in *Abood* required *all* employees in the bargaining unit to pay the same monetary amount to the union. There was no discrimination on the basis of membership or non-membership in the union. Under the statute all employees paid

the same amount—full union dues.

Just last term, this Court stated:

> [I]n *Abood* [citation omitted], we found no constitutional barrier to an agency shop agreement between a municipality and a teachers' union insofar as the agreement required *every employee* in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.

Ellis v. Railway Clerks, _____ U.S. _____ , 104 S. Ct. 1883, 1892 (1984) (emphasis supplied).

Abood is irrelevant to the instant action, and the Court of Appeals correctly rejected the arguments "that this case must be decided on the basis of Bowman's constitutional claims" and "that this case is controlled in every aspect by *Abood*." (Resp. App. 15a) The union preference provisions at issue in this case are not the equivalent of the agency shop provisions addressed in *Abood*.

Agency shops have been justified because they tend to ensure the economic viability of the bargaining agent and spread the permissible costs of collective bargaining among the employees covered by the agreement. Union preference agreements, on the other hand, do nothing to further the purposes of collective bargaining. Their sole

function is to provide a basis for discriminating between various classes of employees. Since prior rulings of this Court make it clear that an exclusive representative may not discriminate against different classes of employees, the Court of Appeals correctly held that the petitioners breached their duty of fair representation by negotiating and enforcing these discriminatory union preference clauses.

This case was properly decided and is consistent with the prior holdings of this Court. Additionally, there is no split in the circuits. Although this is a case of first impression under the Tennessee Valley Authority Act, the prior teachings of this Court under other pertinent statutes support the decision of the Court of Appeals. Review by this Court is not necessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 28, 1985

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit, September 24, 1984

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

W. EUGENE BOWMAN,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY; Salary Policy Employee Panel; and Office and Professional Employees International Union, AFL-CIO,
Defendants-Appellees.

No. 83-5414
Argued July 10, 1984.
Decided Sept. 24, 1984.

Before LIVELY, Chief Judge, MARTIN, Circuit Judge, and KRENZLER, District Judge.*

LIVELY, Chief Judge.

The question raised by this appeal is whether a collective bargaining agreement which contains neither a union shop nor an agency shop provision may validly grant a preference to union members over non-union employees in avoiding involuntary transfers.

I.

A.

The parties stipulated most of the facts. TVA is a governmental corporation created by the Tennessee Valley

* The Honorable Alvin I. Krenzler, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Authority Act of 1933, 16 U.S.C. §§ 831-831dd, as amended (The Act). It is empowered by section 3 of the Act, 16 U.S.C. § 831b (1976), to "provide a system of organization to fix responsibility and promote efficiency" among its personnel. Acting pursuant to that section, TVA in 1950 entered into a collective bargaining agreement, the Articles of Agreement, with the defendant Salary Policy Employee Panel (SPEP), which in turn is comprised of several unions. One of SPEP's member unions is the defendant Office and Professional Employees International Union (OPEIU) which is the collective bargaining agent for the unit which included the position held by the plaintiff, Eugene Bowman.

TVA hired Bowman as a real estate appraiser in its Chattanooga, Tennessee office in 1966. He did that work out of the Chattanooga office until the summer of 1979 when TVA decided that one of the four appraisers then assigned to Chattanooga should be transferred to Florence, Alabama.

In deciding who would be transferred, TVA followed a provision in the Articles of Agreement. Supplementary Agreement S-7 of the Articles set out the following procedure for transfer of employees from a "surplus" location to another duty station:

> (1) First, employees at the surplus location are given an opportunity to request transfer to the vacant position. Among those who request transfer, the union members have preference for transfer, and among union members, the one with the earliest current service date has the highest preference.

> (2) If no employee at the surplus location requests transfer, an employee at the location may be directed to transfer. In selection among employees at the surplus location for directed transfer, the union members have preference for retention at that location and among union members the one with the earliest current service date has the highest retention standing.

In accord with the agreement, TVA first asked for volunteers for transfer. None of the four appraiser responded. At that time, two of the four were members of the union. One of the union members, William Trundle, had worked for the TVA about 15 years but had joined the union in the spring of 1979 primarily to acquire preference status in case of transfer. Bowman did not belong to the union and was junior in seniority to the other non-union member. As such he was directed to transfer. Bowman refused to report to Florence and eventually was terminated for refusing to accept the directed transfer.

After TVA notified Bowman he would have to transfer but before it discharged him, the remaining non-union appraiser, Thomas W. Elder, applied for and obtained membership in OPEIU. Thus all three appraisers were union members at the time Bowman was fired. TVA then directed Marion Wright who had the most union seniority but the least seniority with TVA to transfer to Florence. Bowman had greater seniority than Wright.

The parties also stipulated that TVA's policy is that recognition of responsible unions as exclusive collective bargaining agents for its employees provides an orderly

and effective means of achieving TVA's programs. The union preference provision, which has been part of the Articles of Agreement since 1950, is considered a form of union security for SPEP's member unions. TVA deems the purpose of the provision is to encourage employees to participate in their unions, and thereby improve employee relations. It considers union membership and participation to be "positive factors of merit and efficiency" relevant to selecting employees for transfer, promotion and retention. However, TVA has rejected proposals for other forms of union security—a union shop or agency shop.

B.

Bowman was discharged by TVA on October 29, 1979, when he refused to accept the transfer from Chattanooga to Florence. He pursued grievance procedures on three complaints, including the one involved in this suit, that he was terminated solely because he was not a member of the union. After all grievances were denied he filed this action in federal district court, naming as defendants his employer, TVA, and his collective bargaining agents, SPEP and OPEIU. In his complaint Bowman challenged the provision of the collective bargaining agreement which gives preference to union members over non-member employees in the same bargaining unit in avoiding involuntary transfers. He alleged that the union preference provision constituted a breach of the unions' duty of fair representation owed to all members of the bargaining unit, union members and nonmembers alike. Bowman also charged that the union preference provision violated rights guaranteed to him by the First and

Fifth Amendments to the United States Constitution.

Upon agreement of the parties, the case was tried without a jury. The district court entered findings of fact and conclusions of law, deciding that Bowman failed to establish any constitutional violations or breach of a duty of fair representation. It entered judgment for the defendants and dismissed the action on the merits. The findings of fact largely reflected the stipulations of the parties.

II.

If we are able to decide this appeal on nonconstitutional grounds we will do so and will not reach the First and Fifth Amendment issues. In proceeding this way we follow the longstanding practice of the Supreme Court as set forth by Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case," *quoting Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482), and of this court, *e.g., Seals v. Quarterly County Court of Madison County, Tennessee*, 526 F.2d 216, 219 (6th Cir. 1975). Accordingly, we look first at Bowman's claim that the district court erred in finding that there had been no violation of a duty of fair representation.

A.

The duty of fair representation is one which arises as a

corollary to a union's right to act as the exclusive representative of a group of employees. This duty is not stated explicitly in any of the federal labor relations laws, but has been found by the Supreme Court to arise by implication from the right of exclusive representation granted by the Railway Labor Act, as amended, 45 U.S.C. § 151, et seq., and the National Labor Relations Act, as amended, 29 U.S.C. § 141, et seq. The seminal decision of the Supreme Court on the duty of fair representation is *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). There the railroad employer and the union representing locomotive firemen agreed to a provision in a collective bargaining agreement which had the effect of greatly limiting the employment opportunities of Negro firemen who were not members of the union. The Supreme Court concluded that "Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority." *Id.* at 199, 65 S.Ct. at 230. The Court pointed out that a minority of the craft could not choose their own bargaining representative or bargain individually under the Railway Labor Act. It likened the duty of the union to represent all members of the craft, whether members of the union or not, at least to the extent of not discriminating against them, to the duty of a legislature to treat equally with all for whom it legislates. *Id.* at 198, 65 S.Ct. at 230.

Steele involved racial discrimination by a union operat-

ing under the Railway Labor Act, but the principles laid down there have been applied to all types of discrimination by labor unions. This was made clear in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), and *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967), where there were no charges that the alleged discrimination was based on racial animus and where the controlling statute was the National Labor Relations Act. *Vaca v. Sipes* involved the failure of a union to carry a discharged employee's grievance to the final step of arbitration under the collective bargaining agreement. Harking back to *Steele*, the Court described the duty of fair representation as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 3867 U.S. at 182, 87 S.Ct. at 912. The Court then set forth the criteria for finding a union liable for a failure of fair representation:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

Id. at 190, 87 S.Ct. at 916.

B.

Under the Tennessee Valley Authority Act, 16 U.S.C. § 831b, TVA is exempt from the provisions of federal civil service laws and pursuant to the definition sections of the National Labor Relations Act, 29 U.S.C. §§ 142(3), 152(2), it is exempt from that Act. However, neither TVA nor the unions contest the district court's

conclusion that the unions are subject to a duty of fair representation. This is so because TVA's authority to bargain collectively with the unions as the exclusive representatives of employees in Bowman's classification derives from provisions of the TVA Act which broadly empower TVA to design its own system of personnel management. Since the duty of fair representation arises by implication as a necessary corollary to the right of exclusive representation, the unions are subject to the same obligation toward non-union members of the employee unit as if they were bargaining under the Railway Labor Act or the National Labor Relations Act.

The defendants argue that the union preference clause in the Articles of Agreement is not an illegal provision which discriminates against employees who are not union members. Rather, they assert, it is a limited union security provision. Other union security provisions are valid, they argue, and the one at issue here is less burdensome on employees than either a union shop or an agency shop. Under a union shop agreement all employees must join the union representing their bargaining unit within a stated period after being hired or suffer discharge. In an agency shop all employees in a covered unit must pay to the union under penalty of discharge fees equal to their share of the cost to the union of carrying out its duties and responsibilities as their representative. The defendants contend that if provisions which require membership in a union or payment to a union as a condition of retaining employment are valid, surely one which merely grants a special status to union members with respect to involuntary transfers will pass muster.

The district court did not adopt the defendant's [*sic*] arguments. Rather, it cited *Vaca v. Sipes*, and discussed the criteria set forth in that decision. The court found that the agreement for union preference was not arbitrary because it served legitimate purposes of the parties (union membership promotes better cooperation by employees with TVA policies and practices, greater efficiency in operations, eliminates "free riders," and offers a vehicle for advancement from employee status to management). The district court also found no evidence of bad faith on the part of the union in bargaining for the transfer preference, and "taking into account that this provision was forged in the crucible of collective bargaining, the transfer provision is not unfairly discriminatory."

III.

A.

We consider the defendants' arguments before analyzing the district court's reasoning. It is true that union shops were prohibited under the Railway Labor Act when the *Steele* case was decided because union shops were equated at the time with company unions. However, in 1950 Congress amended the RLA to permit union shop agreements since by then most railroad employees belonged to independent unions and Congress was persuaded that non-union employees should not be permitted a "free ride" by enjoying the benefits of collective bargaining without paying any of the costs. S.Rep. No. 2262, 81st Cong., 2d Sess., *reprinted* in 1950 U.S. Code Cong. & Ad. News 4319, 4321; H.R.Rep. No.

2811, 81st Cong., 2d Sess. 4, *quoted in International Ass'n of Machinists v. Street*, 367 U.S. 740, 762, 81 S.Ct. 1784, 1796, 6 L.Ed.2d 1141 (1961) and *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 231, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

The Supreme Court upheld the provisions of the 1950 amendments, *Hanson*, 351 U.S. at 238, 76 S.Ct. at 721, but construed the statutory authorization for compulsory unionism as requiring payment by unwilling union members only of the costs directly related to collective bargaining and as precluding exaction of payment for support of political causes, *Street*, 367 U.S. at 768-69, 81 S.Ct. at 1799-1800. In *Street*, the Court repeated that in *Steele* it had required a union chosen by the majority of employees as the exclusive agent of all employees to fairly represent all, whether members of the union or not. *Id.* at 761, 81 S.Ct. at 1796. The judicially implied duty of fair representation first articulated in *Steele* was one of the bases for congressional acceptance of the union shop amendment. It is because a union which is an exclusive bargaining agent is prohibited from discriminating against any member of the unit it represents that it is permitted to negotiate an agreement which requires all members of the bargaining unit to support its bargaining activities with payments of dues or service fees. The corollary which *Steele* found to exist between the privilege of exclusive representation and the duty of fair representation was cited to justify the union security device of the union shop.

The fact that the defendants might have negotiated a union shop or agency shop agreement, but chose not to

do so, does not relieve the unions of their responsibility to fairly represent those employees who have chosen not to join the union. Counsel for SPEP and OPEIU argues that the transfer preference provision is actually a form of agency shop agreement. That is obviously not the case. Bowman was not required to make payments to the unions as a condition of holding his job, and he could not have been fired for failing to make such payments. While the courts have said that a person can be required to make payments to his or her representative to cover the costs of the benefits enjoyed by all, no court has said that a union which fails to obtain a union shop or agency shop agreement may treat non-union members of a bargaining unit in a discriminatory manner. *Steele* and the decisions which have followed it prohibit such treatment.

B.

The district court appears to have held that no discrimination was involved in regard to the union preference provision because it was "forged in the crucible of collective bargaining," and that this finding determines the issue of fair representation. We find error in this reasoning in two respects. First, the fact that a provision which favors some members of a unit over others results from collective bargaining does not guarantee that it will avoid being condemned as discriminatory. The duty of fair representation requires the representative to bargain for a contract which does not discriminate against minority members of the unit. *Steele*, 323 U.S. at 201, 65 S.Ct. at 231. An exclusive bargaining representative has a duty "fairly to represent

all of those employees [in the bargaining unit], *both in its collective bargaining* with [the employer] . . . and in its enforcement of the resulting collective bargaining agreement." *Vaca v. Sipes*, 386 U.S. at 177, 87 S.Ct. at 910 (citations omitted). See also *Journeymen Pipe Fitters Local 392 v. N.L.R.B.*, 712 F.2d 225, 228 (6th Cir. 1983) ("As the exclusive labor representative of employees in a bargaining unit, a union has a statutorily-imposed duty to fairly represent all of the employees, union members or not, *in the collective bargaining process* and in the administration of the resulting labor contract."). (Emphasis supplied in both quotations.) The duty of fair representation arises first in the negotiation of a collective bargaining agreement, and the fact that an employer and a union agree to a provision which favors one group of unit employees over another does not immunize that provision from attack on the ground of unfair representation.

The second flaw in the district court's analysis lies in its emphasis on bad faith. In its opinion the district court quoted from a law review comment to the effect that "an employee disadvantaged by a contract has no claim of unfair representation against his union unless he can demonstrate actual bad faith in negotiation." The quoted language does not accurately reflect the duty of fair representation as interpreted by this court. In *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1103 (6th Cir. 1981), the court held that bad faith or fraud is not a necessary element of a charge against a union for violation of its duty of fair representation. Similarly, in *Ruzicka v. General Motors Corp.*, 523 F.2d 306, 310 (6th Cir. 1975), *cert. denied*, ____ U.S. ____, 104 S.Ct. 424, 78 L.Ed.2d

359 (1983), the court stated:

> We believe that the District Court misread *Vaca* when it held that "bad faith" must be read into the separate and independent standards of "arbitrary" or "discriminatory" treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation.

We find the same error in the district court's treatment of the separate standards in the present case.

C.

We conclude that the union preference provision does discriminate unlawfully against Bowman and other members of the bargaining unit who do not belong to the unions. The unions enjoy the position of exclusive representatives of employees in Bowman's classification under a contract which permits membership within the unit regardless of whether an employee has chosen to affiliate with a union. The duty of fair representation, under these circumstances, prohibited the unions from bargaining for or agreeing to any provision which singles out the employees in the unit who are not union members for disparate treatment. As the court stated in *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 198-99 (4th Cir. 1963):

> At least in the absence of a valid union shop agreement—there is no such agreement here—disparate treatment in representation cannot be tolerated when based on the disadvantaged individual's or group's non-membership in the statutory bargaining agent.

In effect the union preference provision denied Bowman, in the instance of an involuntary transfer, of the benefit of seniority which he had acquired in 13 years of employment by TVA. Absent this provision he could have required the transfer to Florence of one of the appraisers with less seniority. As the court in *Jones v. Trans World Airlines*, 495 F.2d 790, 797 (2d Cir. 1974), stated:

> Discrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit.

IV.

Both TVA and the unions insist that this case must be decided on the basis of Bowman's constitutional claims. We disagree. A union which represents groups of employees has a duty of fair representation which derives from its statutory right to be the exclusive representative of all the covered employees, not from a constitutional right of the employees. An act of a union may violate both its duty of fair representation and some constitutional right of the disadvantaged employees, but this is not necessarily true in all cases. Both defendants maintain that this case is controlled in every aspect by *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). In *Abood* the Supreme Court upheld an agency shop agreement to the extent that it required employees who were in the bargaining unit but were not union members to pay "service charges" to the union for "collective-bargaining, contract administration, and grievance-adjustment purposes." *Id.* at 232. The only

issue in *Abood* was the constitutionality of this agency shop agreement. This agreement was attacked on the ground that it violated First Amendment rights of non-union teachers. There was no separate claim that the negotiation and enforcement of the agreement violated the union's statutory duty of fair representation. *Abood* was concerned only with the constitutional validity of a particular agreement, an issue we do not reach because this case can be decided on a non-constitutional ground which was pled and argued as a discrete claim for relief.

CONCLUSION

In his complaint the plaintiff sought declaratory and injunctive relief, reinstatement with seniority rights and damages. Plaintiff is entitled to declaratory and injunctive relief because of the invalidity of the union preference clause in the Articles of Agreement. He is also entitled to reinstatement since his discharge resulted solely from his refusal to comply with an order based on an unlawful provision of the Articles. The case must be remanded for a determination of damages in light of the Supreme Court's recent decision in *Bowen v. United States Postal Service*, 459 U.S. 212, 103 S.Ct. 588, 74 L.Ed.2d 402 (1983). In *Bowen* the Court held that a union may be held primarily liable for that part of a wrongfully discharged employee's damages caused by the union's breach of its duty of fair representation. Prior to *Bowen* this court stated in *Farmer v. ARA Services, Inc.*, 660 F.2d at 1107:

> Where, as in the present case, the union's breach of its statutory duty results also from its wrongful participation in the breach of contract or from the

> negotiation of discriminatory contractual provisions, then the union may be held jointly and severally liable with the employer or its liability for damages may be apportioned to the extent that it shares responsibility for the damage.

The judgment of the district court is reversed and the cause is remanded for further proceedings as required by this opinion. The plaintiff will recover his costs on appeal.